### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

New York University

**Employer** 

and Case 02-RC-023481

GSOC/UAW

Petitioner

POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY Employer

and Case 29-RC-012054

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) Petitioner

James O'Kelly files this brief in response to the request of the National Labor Relations Board for amicus briefs *addressing* several questions revolving around *Brown University* and *New York University*. In this brief, I address two of the Board's questions, specifically (1) whether Brown University should be overruled or modified and (2) if *Brown University* is modified or overruled, should the Board continue to find that graduate student assistants engaged in research funded external grants are not statutory employees, in part because they do not perform a service for the university.

### STATEMENT OF INTEREST

I am a law student at Rutgers School of Law-Newark. My primary interest of study is labor law and employment law. I have been following labor issues for several years and have no vested interest in the outcome of any particular issue, including the one before us. This brief does not purport to represent the views or opinions of Rutgers University.

### I. THE BOARD MUST OVERRULE BROWN UNIVERSITY.

## A. THE PRIMARY PURPOSE TEST MUST BE ABANDONED: AGENCY IS THE PROPER STANDARD FOR THE BOARD TO APPLY WHEN DETERMINING WHETHER GRADUATE STUDENTS ARE COVERED AS EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT.

The definition of who constitutes an "employee" under Section 2(3) of the National Labor Relations Act has become an increasingly difficult question to answer in our continuously developing and complex nation. As new and unique groups of individuals in different circumstances seek representation and thus the protections and benefits afforded by the Act, the Board must continue to apply the broad definition of "employee" found in Section 2(3) *unless* that specific group of individuals is *explicitly* prohibited by the Act itself. The Act guarantees that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 2(3) states that the term employee "shall include any employee." The limitations of and restrictions to Section 2(3) include "agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the

NLRA." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891. Curious exceptions and peculiar carve-outs for specific groups of individuals not restricted by the Act do more than just fly in the face of congressional intent; they allow arbitrary standards to replace well-defined and determined definitions of the Act.

The proper standard to determine if graduate student assistants are statutory employees within the meaning of Section 2(3) of the Act is the common-law principle of agency. Using a master-servant relationship analysis, an agency relationship may be identified where a servant performs services for another, under the other's control or right of control, and in return for payment. NLRB v. Town & Country, 516 U.S. at 90–91, 93– 95. Town & Country mandates that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term . . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." Id at 94. Applying the agency standard, it is clear that graduate student assistants who perform services at a university in connection with their studies are employees. As New York University methodically detailed, graduate student assistants are employed by their schools, receive payment for their work and are carried on the school payroll. 332 N.L.R.B. 1205, 1206.

Brown University's affirmation of Adelphi's holding that graduate students are not to be afforded collective bargaining rights "because they are primarily students" is indefensible, flawed and unsound. The Board needlessly and arbitrarily overturned a

unanimous decision in New York University which recognized that the proper standard to apply to graduate student assistants was agency principles. The *Brown* decision can be best explained by its predecessor, St. Clare's Hospital, where the Board held that "since the individuals are rendering services which are directly related to -- and indeed constitute an integral part of -- their educational program, they are serving primarily as students and not primarily as employees." 229 N.L.R.B. 1000, 1002. The decision then puts forth the unwarranted and unsubstantiated proposition that "subjecting academic decisionmaking to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment." Id at 1002. Research has shown this statement to be incorrect. The idea that graduate student assistant work is irrelevant to wages, hours and terms and conditions of employment because it centers around academia was directly rebuffed by a survey conducted by and reported in the Hofstra Labor & Employment Law Journal which found that a majority of the student-worker respondents found "wages and salary" as their top concern<sup>1</sup>. 21 Hofstra Lab. & Emp. L.J. 753, 786. As one student surveyed explained, "our department only pays for 25 hours per week, even though you are required to work 40+, and you are not allowed to 'bank' hours to take any time off." Id at 789. Texas Woman's University goes so far as to define a graduate assistant as "both a student and a faculty member." http://twu.edu/gradschool/graduate-assistants.asp. Their description of the position correctly identifies the *dual* student/employee concerns a graduate student assistant has: "As a student, the assistant is expected to maintain high academic standards to retain the assistantship. As a faculty member, the assistant is

<sup>&</sup>lt;sup>1</sup> The survey was conducted at the University of Illinois at Urbana-Champaign, Temple University, Brown University, New York University, Yale University, Cornell University, and the University of Pennsylvania.

expected to complete teaching and research responsibilities in a timely and efficient manner." Id. This dual-concern idea should be adapted by the Board as the model to consider when scrutinizing the responsibilities of graduate student assistants. If further proof is still required to debunk the myth that graduate students are serving primarily as students rather than as employees, one needs to only look to the corporate models adopted by Yale University and New York University. "At Yale, between the years 1980 and 1997 the number of full-time faculty decreased, while the number of graduate teaching assistants increased from 778 in 1980 to 1,039 in 1997. Teaching assistants at New York University teach twenty percent of all classes. Teaching assistants at both New York University and Yale provide these services at considerably lower salaries than those that either university would be required to pay a professor in the absence of available graduate students." 21 Hofstra Lab. & Emp. L.J. 753, 775. Brown University overlooks the economic realties and job responsibilities of graduate student assistants while adhering to a flawed "primary purpose" test which must be replaced with agency principles.

Brown creates an exception to Section 2(3) of the Act without any explanation as to why agency principles are to be replaced. The "primarily students" standard sweeps an entire category of employees into a unit not covered under the Act without any fundamental reasoning. The Brown treatment of the definition of "employee" strays so far from congressional intent and past precedent that it wreaks of partisan rulemaking. Member Fanning understood that this standard was beyond arbitrary, noting in Cedars Sinai that when construing the meaning of employee, "the conventional meaning of the word implies someone who works or performs a service for another from whom he or she

receives compensation." Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 255 (Fanning, member, dissenting). By overturning Brown University, the Board will be in a position to properly classify groups of individuals who rightfully deserve the protections of the National Labor Relations Act.

### B. COLLECTIVE BARGAINING BY GRADUATE STUDENT ASSISTANTS IS A COMMON TREND WHICH DOES NOT INFRINGE UPON ACADEMIC FREEDOMS OR THREATEN THE FACULTY-STUDENT RELATIONSHIP.

Brown University warns alarmingly that "collective bargaining would unduly infringe upon traditional academic freedoms." 342 N.L.R.B. 483, 490. These institutional freedoms include "course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns." Id at 490. In reality however, graduate student unionization has focused on sharply different issues. Unionization efforts of graduate student assistants are similar to any other work environment. The core issues focused on by these graduate student assistants include office space, training resources, access to telephones, childcare, paid medical benefits, higher salaries, and job security. http://cgeu.org/faq.php. At least fourteen states have laws explicitly allowing for graduate student assistants to collectively bargain<sup>2</sup>. *Id*. In the Hofstra Labor & Employment Law Journal survey, respondent graduate student assistants who were currently in a union or engaged in unionization efforts were asked "how, if at all, being a union member or taking part in unionization efforts affected the graduate students' relationships with the members of the university faculty that they work for." 21 Hofstra Lab. & Emp. L.J. 753, 796. Overall, there was little to no impact upon these student-teacher relationships which *Brown* sought

<sup>&</sup>lt;sup>2</sup> California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Wisconsin allow graduate student assistants to collectively bargain.

to protect. "The majority of the respondents, 50.6%, indicated 'Little to no impact' at all, while 31.4% reported only a 'Slight impact' on the relationship. Very few reported 'Moderate' or 'High impact' – 9.9% for 'Moderate' and 4.7% for High." *Id* at 796-797. These facts make clear that *Brown's* academia freedom concerns miss the mark completely.

Across this country, graduate student assistant unions have been able to find common ground with school administrations at a highly successful rate without impairing the faculty-student relationship. In 1969, the first graduate employee union was recognized at the University of Wisconsin-Madison. http://cgeu.org/faq.php. Since 1975, at least 22 graduate student unions have been recognized by various universities throughout the United States<sup>3</sup>. *Id.* Before *Brown* and after, harmony has existed between the schools and graduate student assistant unions without any impairment to academia or threat to school authority to shape policy and procedure. In a memo circulated at New York University, Provost David W. McLaughlin and executive vice president Jacob J. Lew conceded that graduate student assistants face issues beyond the educational context which need to be addressed collectively. In summing up the memo, New York Times reporter Karen Arenson wrote "N.Y.U. had come to understand the importance of giving graduate assistants a strong collective voice to help the university better understand their desires, needs and concerns." Karen W. Arenson, N.Y.U. Moves to Disband Graduate Students Union, N.Y. Times, June 17, 2005. Lewis and McLaughlin further admit what is already known, mainly that collective bargaining can succeed in an academic setting and that it must be allowed if improvements are to come: "The collective bargaining process,

<sup>&</sup>lt;sup>3</sup> For a full list of these schools, please visit <a href="http://cgeu.org/faq.php">http://cgeu.org/faq.php</a>, where the school name, date of recognition and affiliation are listed.

while challenging at times, identified issues of importance to our graduate students and produced valuable improvements<sup>4</sup>." *Brown* overlooks what collective bargaining can do for graduate student assistants, a point which students, professors and *even* educational administrators agree on. The reality is that there are addressable issues which transcend the educational control concerns which *Brown University* narrowly sought to protect.

Collective bargaining by graduate students does not threaten academic freedom.

The bargaining process does not threaten the student-faculty or student-administrator relationship either. By overturning *Brown University*, the Board will recognize what McLaughlin and Lew already have, that there are "desires, needs and concerns" beyond the educational context which must be addressed. With collective bargaining, settlement of those issues can be accomplished.

# II. WHEN DETERMINING IF GRADUATE STUDENT ASSISTANTS ENGAGED IN RESEARCH FUNDED BY EXTERNAL GRANTS ARE STATUTORY EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT, THE BOARD SHOULD AVOID BRIGHT LINE RULES AND CLASSIFACTIONS BY APPLYING A TOTALITY OF THE CIRCUMSTANCES TEST.

It is quite obvious that not every graduate student assistant would or should fit neatly within the meaning of "statutory employee" under the National Labor Relations Act. Situations will arise where a graduate student assistant clearly will not meet the requirements of agency. Circumstances will sometimes dictate that a graduate student assistant's duties and responsibilities merit a finding of no "statutory employee" under the Act. Nonetheless, agency principles should be applied carefully to unique situations.

<sup>&</sup>lt;sup>4</sup> To view the entire memo, please visit http://www.nyu.edu/about/leadership-university-administration/office-of-the-president/office-of-the-provost/redirect/communications/ga-ta-issues/memo-to-the-community-from-jacob-lew-and-david-mclaughlin0.html.

To ensure that a fair, intelligent and even decision regarding "employee status" is made, the Board should require an intensive fact-finding investigation into the circumstances of the specific graduate assistant program in question. Special emphasis should be placed on the *type of grant*, terms, conditions, instructions, limitations and requirements of the external grant, the amount of independence or lack thereof the graduate student has in completing the work, and the relationship of the university program to the specific grant awarded to the department. By considering these elements as a whole, one could make a fair and reasonable assessment as to whether or not a graduate student assistant conducting research under an external grant fulfills the requirements of agency *and* is truly delivering services to another in their affairs.

New York University explained the circumstances of the students performing research under external grants clearly and distinctively. "These GAs and RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU.

332 N.L.R.B. 1205, 1220. A stringent standard automatically excluding these students due to a strict interpretation of the Restatement of Agency applied to their graduate assistant particularities is incorrect. In FedEx Home Delivery, the United States Court of Appeals for the District of Columbia Circuit cautioned that "the Restatement's non-exhaustive ten-factor test is not especially amenable to any sort of bright-line rule, a long-recognized rub. Thus, there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." FedEx Home Delivery v. NLRB, 563 F.3d

492, 496. Therefore, every aspect of the external grant process, from delivery of the funds to the school to research being conducted in furtherance of the grant to requirements set by the school for the research to be conducted to the tangible and intangible benefits earned by the school from the research must be scrutinized.

By considering the circumstances surrounding the external grants, the Board will be able to reach a sensible conclusion. The more that a school is able to control the external grant process, the more likely the graduate student is providing a service to the university. For example, the right to shape and control the complete grant process with minimal instruction or guidance from the issuer would suggest a broad authority by the school to control the research process and the researcher. The NIH allows a school to apply for an "unsolicited grant." Under this type of grant program, a professor employed by a school personally creates the specific research program. The NIH website further notes that some grants allow the school to decide on their own budget and develop management systems in support of the grant. With minimal input from the issuer, the school has essentially complete domain over the external grant process. http://grants.nih.gov/grants/managing awards.htm#pre. Such freedom to independently shape a research project and then direct a researcher suggests a master-servant relationship. When a graduate student performs work under an unsolicited grant designed by faculty, the student proves a service in furtherance of the school's reputation, and thus, for the school itself. If an external grant, solicited or not, lacks oversight and requires little to no updates to the issuer or status reports to be filed, the university is once again in "primary control" of the grant, the research and the researcher. This lack of "third party control" suggests a master-servant relationship. On the other hand, an

external grant process where overall control remains with the issuer would release the school from a master-servant relationship. When a third party has true authority and directly employs that authority in oversight, no agency relationship between the student and school exists. Strict reporting requirements, preset budgets, continuous oversight and power of final decision by the issuer are all facts to consider. An external grant which is created and defined by the issuer rather than the school would also lack the elements of a master-servant relationship. Here, the school would simply be a recipient of funds, conducting research in furtherance of someone else's goals or instructions.

By conducting a fact-intensive inquiry into the actual grant process, the Board will be able to apply agency principles to unique research situations in order to determine if graduate students engaged in research funded by external grants are statutory employees. When the source of external funding has little to no input, control or reporting requirements, the Board should look carefully to see if the school assumes a quasi master-servant relationship. If the external grant program is rigorous with input from the issuer and strict reporting requirements by the issuer, the Board should determine if control has remained generally with the issuer.

### **CONCLUSION**

The Board should overrule *Brown University*. When determining if graduate student assistants are statutory employees under the Act, the Board must follow agency principles. Adherence to the "primarily students" standard treats graduate student assistants as a special, distinct unit, even though no supportive reasoning has been provided for doing so. Research, administrator commentary and continuous labor peace at various universities shows that graduate student unionization can occur without

threatening academia or institutional control and choice. Further, when applying agency principles to graduate students working under externally funded grants, the Board should keep in mind that bright line rules for agency principles are not workable. A totality of the circumstances test in each dispute can fairly determine if those students are statutory

employees under the Act.

Respectfully Submitted,

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